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No. 03-111

In the Supreme Court of the United States

TENNESSEE AND TENNESSEE DEPARTMENT OF ENVIRONMENT AND CONSERVATION, PETITIONERS

v.

DEPARTMENT OF TRANSPORTATION, RESEARCH AND SPECIAL PROGRAMS ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether principles of state sovereign immunity bar the Secretary of Transportation from making an administrative determination as to whether the Hazardous Materials Transportation Act, 49 U.S.C. 5125(a), preempts a state requirement regarding the transportation of hazardous material.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	15

TABLE OF AUTHORITIES

Cases:

Alden v. *Maine*, 527 U.S. 706 (1999)	8
Diamond v. *Charles*, 476 U.S. 54 (1986)	13
Doctor's Assocs., Inc. v. *Casarotto*, 517 U.S. 681 (1996)	12
Federal Maritime Comm'n v. *South Carolina State Ports Auth.*, 535 U.S. 743 (2002)	6, 7, 8, 10, 11
National Recycling Coalition, Inc. v. *Browner*, 984 F.2d 1243 (D.C. Cir. 1993)	12
Norfolk S. Ry. v. *Shanklin*, 529 U.S. 344 (2000)	12
Southern Pac. Transp. Co. v *Public Serv. Comm'n*, 909 F.2d 352 (9th Cir. 1990)	2, 3
Tennessee Dep't of Human Servs. v. *United States Dep't of Educ.*, 979 F.2d 1162 (6th Cir. 1992)	6
United States v. *Mead Corp.*, 533 U.S. 218 (2001)	9
Verizon Md. Inc. v. *Public Serv. Comm'n*, 535 U.S. 635 (2002)	14
Young, Ex parte, 209 U.S. 123 (1908)	14

Statutes, regulations and rule:

Administrative Procedure Act, 5 U.S.C. 551 *et seq.*	8
5 U.S.C. 551(4)	9
5 U.S.C. 551(6)	10
5 U.S.C. 553(b)	11
5 U.S.C. 553(c)	11, 12
5 U.S.C. 553(e)	11

Statutes, regulations, and rule:	Page
5 U.S.C. 556	11
5 U.S.C. 557	11
Hazardous Materials Transportation Act, 49 U.S.C. 5101 *et seq.*	2
49 U.S.C. 5101	2
49 U.S.C. 5123(a)(1)	9
49 U.S.C. 5125	3
49 U.S.C. 5125(a)	4
49 U.S.C. 5125(a)-(c)	3
49 U.S.C. 5125(a)(2)	5
49 U.S.C. 5125(b)(1)	4
49 U.S.C. 5125(c)	4
49 U.S.C. 5125(d)(1)	4, 12
49 U.S.C. 5125(d)(2)	4
49 U.S.C. 5125(f)	4
49 U.S.C. 5125(g)(1)	3, 5
Homeland Security Act of 2002, Pub. L. No. 107-296, Tit. XVII, § 1711(b), 116 Stat. 2320	3
28 U.S.C. 2403(b)	13
Tenn. Code Ann. § 68-212-203(a)(6) (2002)	5
49 C.F.R.:	
Pt. 1:	
Section 1.53(b)	4
Pt. 107:	
Section 107.205(b)	4
Section 107.209(a)	4
Section 107.209(b)	12
Section 107.213	4
Pts. 171-180	3
Tenn. Dep't of Environment and Conservation Rule 1200-1-13-.03(1)(e) (2002) <http://www.state.tn.us/sos/rules/1200/1200-01/1200-01-13.pdf>	5

Miscellaneous: Page

63 Fed. Reg. (1998):
p. 17,479 13
pp. 17,479-17,483 5
p. 17,483 ..... 5, 13
64 Fed. Reg. 54,474-54,481 (1999) 5
H.R. Rep. No. 1083, 93d Cong., 2d Sess. (1974) 2
H.R. Rep. No. 444, 101st Cong., 2d Sess. Pt. 1 (1990) 3, 9
S. Rep. No. 1192, 93d Cong., 2d Sess. (1974) 2, 3

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-16) is reported at 326 F.3d 729. The opinion of the district court (Pet. App. 18-22) and the report and recommendation of the magistrate judge (Pet. App. 23-82) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 2003. The petition for a writ of certiorari was filed on July 18, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case arises out of an administrative determination by the United States Department of Transportation (DOT) that the Hazardous Materials Transportation Act (HMTA), 49 U.S.C. 5101 *et seq.*, preempts a fee imposed by the State of Tennessee on the transporters of hazardous materials. Congress enacted the HMTA in 1975 "to provide adequate protection against the risks to life and property inherent in the transportation of hazardous material in commerce by improving the regulatory and enforcement authority of the Secretary of Transportation." 49 U.S.C. 5101.

To help achieve the HMTA's safety purpose, Congress sought to address the existing lack of uniformity and coordination in the regulation of hazardous material transportation by "replac[ing] a patchwork of state and federal laws and regulations concerning hazardous materials transport with a scheme of uniform, national regulations." *Southern Pac. Transp. Co.* v. *Public Serv. Comm'n*, 909 F.2d 352, 353 (9th Cir. 1990). One of the central purposes of the original legislation was thus "to broaden federal regulatory control over interstate and foreign shipments of hazardous materials by rail and other transportation modes." H.R. Rep. No. 1083, 93d Cong., 2d Sess. 1 (1974). Congress vested DOT with primary authority to regulate the transportation of hazardous materials in order to encourage a comprehensive approach to the minimization of risks associated with such activities. See S. Rep. No. 1192, 93d Cong., 2d Sess. 1-2 (1974) (*1974 Senate Report*).

Congress also determined that the HMTA should preempt state and local laws that are inconsistent with the federal scheme. The Senate Committee on Commerce explained that federal preemption was war-

ranted in order "to preclude a multiplicity of State and local regulations and the potential for varying as well as conflicting regulations in the area of hazardous materials transportation." *1974 Senate Report* 37. Congress therefore expressly provided for the preemption of state and local hazardous material transportation requirements that were inconsistent with any requirement in the HMTA or in federal regulations adopted under the statute. See *Southern Pac. Transp. Co.*, 909 F.2d at 355.[1]

Industry representatives subsequently informed the House Committee on Energy and Commerce of "the proliferation of needless, burdensome, and often conflicting State and local requirements governing the transportation of hazardous materials." H.R. Rep. No. 444, 101st Cong., 2d Sess. Pt. 1, at 21 (1990) (*1990 House Report*). The House Committee indicated that "a high degree of uniformity of Federal, State, and local laws is required in order to promote safety and to encourage the free flow of commerce." *Id.* at 22. Congress accordingly amended the HMTA to define more specifically the circumstances under which state and local laws will be preempted by the federal statute. See 49 U.S.C. 5125(a)-(c) and (g)(1).[2]

The 1990 HMTA amendments also established an administrative procedure for resolution of preemption

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[1] Pursuant to its statutory authority, DOT has promulgated the Hazardous Materials Regulations, which categorize and classify hazardous materials and impose various requirements on persons who transport such materials or who offer such materials for transportation. See 49 C.F.R. Pts. 171-180.

[2] 49 U.S.C. 5125 was amended on November 25, 2002, by the Homeland Security Act of 2002, Pub. L. No. 107-296, Tit. XVII, § 1711(b), 116 Stat. 2320. All references to Section 5125 are to the statute in its current form.

questions arising under the Act. Before the 1990 amendments were enacted, DOT's practice was to issue "inconsistency rulings" to determine whether a particular state, local, or tribal requirement was preempted by the HMTA. Under the 1990 HMTA amendments, any person directly affected by a requirement imposed by a State, political subdivision of a State, or an Indian Tribe may apply to DOT for an administrative determination as to whether the requirement is preempted by 49 U.S.C. 5125(a), (b)(1), or (c). See 49 U.S.C. 5125(d)(1). In addition, a State, political subdivision of a State, or an Indian tribe may itself apply for a determination with respect to its own requirements. See 49 U.S.C. 5125(d)(1).

Congress directed the Secretary to prescribe regulations governing the issuance of preemption determinations. See 49 U.S.C. 5125(d)(2). The Secretary has delegated the authority to make most preemption determinations, including the determination at issue in this case, to the Associate Administrator for Hazardous Materials Safety of DOT's Research and Special Programs Administration. See 49 C.F.R. 107.209(a); see also 49 C.F.R. 1.53(b). The Associate Administrator is required to publish in the *Federal Register* notice of, and an invitation to comment on, applications for preemption determinations. 49 C.F.R. 107.205(b). After considering the application and other relevant information received, the Associate Administrator issues a preemption determination, 49 C.F.R. 107.209(a), which is then subject to judicial review in an appropriate district court. See 49 U.S.C. 5125(f); 49 C.F.R. 107.213.

2. In March 1998, respondent Association of Waste Hazardous Materials Transporters applied to the Associate Administrator for a determination as to whether the HMTA preempts an annual "remedial action" fee,

which is imposed on hazardous waste transporters under Tennessee law and is deposited in a special state agency account to be used for a variety of purposes relating to hazardous waste. See Pet. App. 91; Tenn. Code Ann. § 68-212-203(a)(6) (2002); Tenn. Dep't of Environment and Conservation Rule 1200-1-13.03(1)(e)(2002) <http://www.state.tn.us/sos/rules/1200/1200-01/1200-01-13.pdf>. The Associate Administrator published notice of the application in the *Federal Register* and invited public comment. See 63 Fed. Reg. 17,479-17,483 (1998). Respondent certified that its application had been forwarded, with an invitation to submit comments, to Milton Hamilton, Jr., the Commissioner of the Tennessee Department of Environment and Conservation. *Id.* at 17,483. In October 1999, the Associate Administrator determined that the HMTA preempts the remedial action fee. See Pet. App. 90-125 (64 Fed. Reg. 54,474-54,481 (1999)).[3]

A State, political subdivision of a State, or Indian Tribe may impose a fee related to transporting hazardous material "only if the fee is fair and used for a purpose related to transporting hazardous material, including enforcement and planning, developing, and maintaining a capability for emergency response." 49 U.S.C. 5125(g)(1). Any fee that is not "fair," or that is "used for" purposes other than those specified in the statute, is preempted under 49 U.S.C. 5125(a)(2). The Associate Administrator determined that Tennessee's

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[3] The Associate Administrator also determined in the same proceeding that the HMTA preempts a separate Tennessee requirement that transporters submit to the State a written incident report within 15 days of any hazardous waste discharge that occurs during transportation within the State of Tennessee. See Pet. App. 92, 117-123. Petitioners did not seek judicial review of that determination. See Pet. 5 n.2.

annual remedial action fee is preempted by the HMTA because the fee is not fair and is not used for purposes related to the transportation of hazardous waste. See Pet. App. 102-117.

3. The State of Tennessee and the Tennessee Department of Environment and Conservation filed a petition for judicial review of the Associate Administrator's determination that the State's remedial action fee was preempted. The case was referred to a magistrate judge, see Pet. App. 23, who issued a report and recommendation concluding that DOT's procedure for making preemption determinations was barred by principles of state sovereign immunity. See *id.* at 77-81. The district court rejected the magistrate judge's proposed disposition of the case. *Id.* at 18-22. The court found that petitioners' claim of sovereign immunity was foreclosed by the Sixth Circuit's decision in *Tennessee Department of Human Services* v. *United States Department of Education*, 979 F.2d 1162 (1992), which had held that "Eleventh Amendment immunity does not apply to Federal executive administrative action." Pet. App. 21.

4. The court of appeals affirmed. Pet. App. 1-16. The court recognized that the district court's constitutional analysis was "no longer complete" in light of this Court's intervening decision in *Federal Maritime Comm'n* v. *South Carolina State Ports Authority*, 535 U.S. 743 (2002), which held that principles of state sovereign immunity barred a private party from commencing a formal administrative agency adjudication against an unconsenting State. See Pet. App. 11. The court of appeals concluded, however, that petitioners' sovereign immunity claims lack merit because the DOT preemption determination process "differs dramati-

cally" from the formal adjudicative process at issue in *South Carolina State Ports Authority*. *Id.* at 13.

In distinguishing between those two processes, the court of appeals considered both "the character of the decision-maker" and "the nature of the decision." Pet. App. 14. With respect to the first of those considerations, the court observed that this Court in *South Carolina State Ports Authority* "focused heavily upon the role of the administrative law judge, finding that an administrative law judge acts as the functional equivalent of an Article III judge." *Ibid.* In making HMTA preemption determinations, by contrast, "the Associate Administrator acts not as an Article III judge, virtually or functionally, but merely, as the title implies, as an administrator of a federal agency interpreting and enforcing federal legislation." *Ibid.*

"The other dispositive factor" on which the court of appeals relied was "the nature of the final determination" made at the conclusion of the administrative proceedings at issue in this case. Pet. App. 14. The court explained:

> Rather than an adjudication of the rights and responsibilities of different parties leading to injunctive relief and an award of monetary damages, the preemption decision in 49 U.S.C. § 5125 does not direct the entry of relief against the State of Tennessee. Instead, it serves as an administrative interpretation of a federal statute, prospective only in its application and warranting *Chevron* deference in subsequent litigation.

Id. at 14-15.

ARGUMENT

Petitioners contend (*e.g.*, Pet. 9, 25) that the court of appeals' decision conflicts with this Court's rulings in *Federal Maritime Comm'n* v. *South Carolina State Ports Authority*, 535 U.S. 743 (2002), and *Alden* v. *Maine*, 527 U.S. 706 (1999). Petitioners' reliance on those decisions is misplaced. *Alden* involved state-court civil litigation, see *id.* at 712, and *South Carolina State Ports Authority* involved formal agency adjudicative proceedings that "bear a remarkably strong resemblance to civil litigation in federal courts," 535 U.S. at 757. Neither decision suggests that federal administrative agencies, in the course of implementing statutory provisions entrusted to their enforcement, are broadly disabled from resolving legal questions that may ultimately affect the interests of a sovereign State. Nor does petitioner identify any lower court decision that has construed this Court's precedents to preclude DOT from making preemption determinations over the objection of the State whose law has been called into question. The decision below thus does not conflict with any decision of this Court or any other court. The petition for certiorari should therefore be denied.

1. The preemption determination at issue in this case does not implicate principles of state sovereign immunity because it "does not direct the entry of relief against the State of Tennessee. Instead, it serves as an administrative interpretation of a federal statute, prospective only in its application and warranting *Chevron* deference in subsequent litigation." Pet. App. 15. A preemption determination made by DOT pursuant to the HMTA fits squarely within the definition of the term "rule" contained in the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, which defines the term

to encompass "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy." 5 U.S.C. 551(4). Regulations promulgated by federal administrative agencies may substantially affect the interests of a particular State or of the States generally, but nothing in this Court's decisions suggests that agency rulemaking implicates principles of state sovereign immunity.

Petitioners rely in part (Pet. 11) on legislative history stating that a DOT preemption determination under the HMTA is made pursuant to a "binding administrative process." See *1990 House Report* 22. That characterization, however, is fully consistent with the court of appeals' conclusion (see Pet. App. 14-15) that the issuance of a DOT preemption determination is properly regarded as the promulgation of an agency rule rather than as the disposition of an agency adjudication. Preemption determinations made after public notice and comment pursuant to congressional authorization are precisely the type of agency action that most clearly warrants *Chevron* deference. See *United States* v. *Mead Corp.*, 533 U.S. 218, 229-231 (2001). And, as this Court recently explained, a regulation that qualifies for deference under *Chevron* "is *binding* in the courts unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *Id.* at 227 (emphasis added).

Petitioners contend that if the State attempts to enforce the requirements that have been held to be preempted, it will be subject to civil penalties for violating a DOT "order." Pet. 24 n.12 (quoting 49 U.S.C. 5123(a)(1)). The preemption determination itself, however, imposes no relief against petitioners. And because the determination is in the nature of rulemaking

rather than adjudication, it falls outside the APA's definition of "order." See 5 U.S.C. 551(6) ("'order' means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency *in a matter other than rule making* but including licensing") (emphasis added). Thus, petitioners run no risk of being subjected to civil penalties on the basis of the preemption determination. Cf. *South Carolina State Ports Auth.*, 535 U.S. at 763, 766-767.

2. The procedures employed by DOT in making HMTA preemption determinations also differ significantly from those employed in civil lawsuits or in administrative adjudications. Unlike the proceedings at issue in *South Carolina State Ports Authority*, preemption determinations are not made by administrative law judges (ALJs), who have "absolute immunity from liability for their judicial acts and are triers of fact 'insulated from political influence.'" Pet. App. 14 (quoting *South Carolina State Ports Auth.*, 535 U.S. at 757 (citation omitted)). Rather, the authority to render DOT preemption determinations has been delegated to the Associate Administrator for Hazardous Materials Safety, who

> is not bound by rules of evidence or procedure and need not remain "insulated from political influence." Clearly, the Associate Administrator acts not as an Article III judge, virtually or functionally, but merely, as the title implies, as an administrator of a federal agency interpreting and enforcing federal legislation in reaching the preemption determination.

Ibid. The agency's determination is made in accordance with the provisions governing informal rulemaking: the Associate Administrator published notice of the appli-

cation in the Federal Register, see 5 U.S.C. 553(b), and provided "interested persons an opportunity to participate * * * through submission of written data, views, or arguments with or without opportunity for oral presentation," 5 U.S.C. 553(c).[4]

The fact that the preemption determination at issue in this case was made in response to an application by a private party does not cast doubt on its status as a rulemaking, since the APA expressly authorizes interested parties to "petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. 553(e). DOT's willingness to consider submissions from other interested parties (including the State) regarding the propriety of a requested preemption determination is similarly consistent with legal provisions governing the promulgation of agency rules. See 5 U.S.C. 553(c) (noting possibility of informal rulemaking proceedings that include "oral presentation," and explaining that 5 U.S.C. 556 and 557 will apply "[w]hen rules are required by statute to be made on the record after opportunity for

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[4] Petitioners' attempt (Pet. 18-19) to analogize the role of the Associate Administrator in this case to that of the Federal Maritime Commission (FMC) in *South Carolina State Ports Authority* is unavailing. The FMC participated in the final stage of a formal adjudicative process by reviewing the decision of an independent and impartial ALJ who had entered relief against a state entity. See 535 U.S. at 759, 762-764; see also *id.* at 766-767. In stating that "FMC administrative proceedings bear a remarkably strong resemblance to civil litigation in federal courts," *id.* at 757, this Court focused on the proceedings before the ALJ, not on the FMC's subsequent review of the ALJ's decision. See *id.* at 757-759. DOT's Associate Administrator, by contrast, is the agency's initial decisionmaker with respect to preemption determinations; the Associate Administrator does not review the decision of some *other* agency official whose role within the DOT might plausibly be analogized to that of an ALJ.

an agency hearing").[5] Petitioners' reliance (Pet. 12) on 49 C.F.R. 107.209(b), which requires that a preemption determination must set out "the relevant facts and the legal basis for the determination," likewise provides no basis for distinguishing such determinations from agency rulemakings generally. See 5 U.S.C. 553(c) (agency must incorporate in its rules "a concise general statement of their basis and purpose"); *National Recycling Coalition, Inc.* v. *Browner*, 984 F.2d 1243, 1252 (D.C. Cir. 1993) (agency must adequately explain the legal basis for its regulations in order for rules to withstand judicial review).

3. Even if the agency proceedings at issue here were properly characterized as adjudicative, petitioners' sovereign-immunity argument would lack merit. Questions concerning federal preemption of state law are frequently presented to and resolved by federal courts in litigation between private parties. See, *e.g.*, *Norfolk S. Ry.* v. *Shanklin*, 529 U.S. 344, 359 (2000) (federal standard for adequacy of warning device at railroad grade crossing displaced Tennessee statutory and common law and thereby preempted tort claim against railroad); *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 688 (1996) (Federal Arbitration Act preempted Montana statute that conditioned enforceability of arbitration clause on compliance with special notice requirements). A State undoubtedly has a significant

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[5] Contrary to petitioners' contention (Pet. 11), the fact that a party seeking to file an application for a preemption determination must be "directly affected by a requirement of a State," 49 U.S.C. 5125(d)(1), does not mean that Congress intended the preemption determination process to be adjudicative. Congress may properly limit the class of persons and entities authorized to invoke an agency's rulemaking authority as well as its authority to adjudicate.

interest in the proper disposition of the question whether its own law is preempted, cf. *Diamond* v. *Charles*, 476 U.S. 54, 62 (1986) ("[A] State has standing to defend the constitutionality of its statute."), and it may appropriately seek to protect that interest through intervention or amicus participation in ongoing civil litigation. See, *e.g.*, 28 U.S.C. 2403(b). Nothing in this Court's decisions suggests, however, that a State's assertion of sovereign immunity could prevent judicial resolution of a preemption question in a dispute between private parties that is otherwise properly before the court. Although the Constitution generally preserves the States' immunity from private suits *against* a State or its agencies, it does not make a State's consent a prerequisite to adjudication of all legal questions that may ultimately affect the State's interests.

In the present case, a copy of the private party's application for a DOT preemption determination was forwarded to the Commissioner of Tennessee's Department of Environment and Conservation. See 63 Fed. Reg. at 17,479, 17,483. Provision of the application to that official ensured that the State would be aware of the ongoing administrative proceeding and would have an opportunity to be heard on the merits of the preemption issues if it chose to participate. Neither the application itself nor any DOT order *compelled* the State to participate in that proceeding, however, nor would the State have been subject to any sanction if it had declined to do so. Thus, even if the administrative proceeding at issue here were found to be adjudicative in character, that proceeding would not properly be regarded, for purposes of sovereign immunity, as a suit *against the State.*

4. Although principles of state sovereign immunity generally preclude private suits against an uncon-

senting State or state agency, an individual state *officer* is subject to suit for prospective relief under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), to prevent ongoing violations of federal law. See generally *Verizon Md. Inc.* v. *Public Serv. Comm'n*, 535 U.S. 635, 645-646 (2002). Even in the unlikely event that the forwarding of an application for a DOT preemption determination to a particular recipient were found to make that person a "defendant" in an agency adjudication, DOT's treatment of the application at issue in this case would be fully consistent with this Court's precedents.

The application submitted by respondent Association of Waste Hazardous Materials Transporters was forwarded to the Commissioner of Tennessee's Department of Environment and Conservation, an individual state officer who would be subject to suit in federal court in an appropriate *Ex parte Young* action. See p. 5, *supra*. Although petitioners' own affirmative suit was filed in the name of the State of Tennessee and the State's Department of Environment and Conservation, those entities were not named as defendants or respondents either by the private applicant or by DOT. See, *e.g.*, Pet. App. 90 (caption of DOT preemption determination). The "relief" sought and received by the applicant—a DOT determination that a specified provision of Tennessee law is preempted by the HMTA—is purely prospective in character. Petitioners therefore would have no tenable sovereign-immunity objection to the challenged DOT proceeding, even if that proceeding were treated as an adjudication, and even if the State's Commissioner of Environment and Conservation were found to have played a role in the administrative process functionally analogous to that of a defendant in civil litigation.

5. Petitioners do not contend that the lower courts are divided on the question presented in the petition. Petitioners identify no court of appeals decision, and we are aware of none, that has construed this Court's decisions in *Alden* and *South Carolina State Ports Authority* to preclude DOT preemption determinations from going forward without the consent of the State whose law has been called into question. DOT informs us that it issues approximately two to three HMTA preemption determinations per year, and that it is aware of no other instance in which a State or state agency has contended that principles of sovereign immunity bar DOT from making such determinations. At least in the absence of a conflict among the circuits, or any reason to suppose that the question presented will recur with any frequency, petitioners' constitutional claim does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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